

2000

## A Call for a Modified Standard: The Supreme Court Struggles to Define When Private Organizations Can Discriminate in Contravention of State Antidiscrimination Laws in *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000)

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### Recommended Citation

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# A Call for a Modified Standard: The Supreme Court Struggles to Define When Private Organizations Can Discriminate in Contravention of State Antidiscrimination Laws in *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000)

## TABLE OF CONTENTS

I. Introduction .....	794
II. Background of Expressive Association .....	796
III. <i>Boy Scouts of America v. Dale</i> : Background Facts and Procedural Posture.....	802
IV. Analysis .....	805
A. The Majority's Standard is Over-protective.....	805
B. The Dissent's Heightened Standard is Under-protective .....	808
C. A Proposed Standard .....	819
V. Conclusion .....	823

## I. INTRODUCTION

Since the Civil Rights Act of 1964,<sup>1</sup> the federal government has played a significant role in reducing invidious discrimination against individuals on the basis of race, religion, color and national origin. Title II<sup>2</sup> of that Act prohibits discrimination or segregation in places of public accommodation if the operations of such establishments affect

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\* Sean B. Druyon, University of Utah, B.S., 1998; University of Nebraska, J.D. 2001 (NEBRASKA LAW REVIEW, Executive Editor, 2001). I would like to give special thanks to my wife and children for all the love and support they have given me.

1. See 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1994).

2. See 42 U.S.C.A. § 2000a.

commerce<sup>3</sup> or if the discrimination or segregation therein is supported by state action.<sup>4</sup> State antidiscrimination and public accommodation statutes generally provide greater protection than Title II.<sup>5</sup> Although state public accommodation laws initially mirrored the Civil Rights Act of 1964, they have progressively increased in scope.<sup>6</sup> State public accommodation laws now prohibit discrimination on the basis of appearance, sexual orientation, physical handicap, past criminal conduct, marital status and much more.<sup>7</sup>

In the wake of these broadening state laws against discrimination lie many private organizations treading to stay afloat in what has become a tumultuous sea of clashing constitutional rights. These private organizations justify their discriminatory membership policies on the grounds they engage in expressive association protected by the First Amendment,<sup>8</sup> while individuals denied membership to these organizations claim equal protection of the law under the Fourteenth Amendment and under state public accommodation laws. Courts at all levels have struggled to establish when a group is constitutionally permitted to discriminate in contravention of state public accommodation laws.<sup>9</sup> Part of this struggle is due to the fact that this conflict is a relatively new one. Indeed, the Supreme Court has addressed this issue on only a few occasions. In each of these cases it applied an ad hoc balancing test, weighing the state's interest in eradicating discrimination on one

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3. *See id.*

4. *See id.*

5. *See generally* Note, *Discrimination in Access to Public Places: A Survey of State and Federal Public-Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238-241 (1978)(discussing how state laws have historically provided the most effective means of preventing discrimination).

6. Many state antidiscrimination statutes define "place of public accommodation" quite broadly, as covering any "business or entertainment . . . facility of any kind whose . . . services . . . are extended, offered, sold, or otherwise made available to the general public." HAW. REV. STAT. § 489-2 (1993); *see also* COLO. REV. STAT. §24-34-601(1)(1999)("any place offering services . . . to the public"); IND. CODE ANN. §22-9-1-3(m)(1997)("establishment that caters or offers its services or facilities or goods to the general public"). Many statutes give a list of examples – though stressing that these are only examples and not limitations – which often include "educational institution[s]," "theatre[s]," and "librar[ies]." COLO. REV. STAT. §24-34-601(1)(1999); *see* Pamela Griffin, *Exclusion and Access in Public Accommodations: First Amendment Limitations upon State Law*, 16 PAC. L.J. 1047, 1050-51 (1985).

7. The District of Columbia, for instance, also bars discrimination based on "age, marital status, personal appearance, sexual orientation . . . family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business." D.C. CODE ANN. § 1-2519 (1981).

8. *See, e.g.*, Neal E. Devins, *The Trouble with Jaycees*, 34 CATH. U. L. REV. 901, 906 (1985); Lois M. McKenna, Note, *Freedom of Association or Gender Discrimination?* New York State Club Association v. City of New York, 38 AM. U. L. REV. 1061, 1066 (1989).

9. *See, e.g.*, Devins, *supra* note 8, at 901.

side, with the private organization's interest in communicating its message on the other. None of these decisions, however, clearly define the criteria for when a private organization can, if ever, prevail over a state's law against discrimination. Essentially, the ad hoc balancing adopted by the Supreme Court has a subjective element that invites inconsistent results.

*Boy Scouts of America v. Dale*<sup>10</sup> presents the issue of whether a private organization is entitled to the right of freedom of expressive association under the First Amendment, thereby exempting it from a state's public accommodation law, when it had a general mission statement to "instill values in young people"<sup>11</sup> and had limited evidence that its exclusionary policy against homosexuality was on the basis that homosexuality was immoral, yet denied a leadership position to a homosexual on the grounds a homosexual's mere presence as a leader would send a message contrary to the Boy Scouts' asserted policy that homosexuality is immoral. *Dale* clearly illustrates that the proper standard for determining whether a private organization can discriminate in contravention of a state's public accommodation law is yet unresolved.

This Note, in Part II, provides a background of Supreme Court cases dealing specifically with the conflict between freedom of expressive association and state public accommodation laws. Part III reviews the procedural posture of *Boy Scouts of America v. Dale*, identifying the central issues and decisions of the courts below. Part IV analyzes the Supreme Court majority's standard and contrasts it with the dissent's heightened standard, concluding that both sides deviate from precedent in reaching their respective conclusions. While the majority's standard provides too much protection to groups at the expense of equality, the dissent's standard provides far too little protection to groups who engage in purely expressive association. Finally, this Note proposes a standard that reconciles these competing standards.

## II. BACKGROUND OF EXPRESSIVE ASSOCIATION

### *Roberts v. United States Jaycees*

The first Supreme Court case addressing whether a private organization had a right to expressive association as a defense to a state's public accommodation law was *Roberts v. United States Jaycees*.<sup>12</sup> The United States Jaycees was a non-profit national membership corporation whose objective was, according to its bylaws, "to pursue such educational and charitable purposes as would promote and foster the

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10. 120 S. Ct. 2446 (2000).

11. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1202 (N.J. 1999).

12. 468 U.S. 609 (1983).

growth and development of young men's civic organizations."<sup>13</sup> The Jaycees advocated a number of political and public causes,<sup>14</sup> and provided management and leadership training to its members.<sup>15</sup> According to the Jaycees' membership policy, only young men between the ages of eighteen and thirty-five years could obtain full membership status, while any other person could achieve an associate member status.<sup>16</sup> Full membership status entitled a member to participate in voting, hold office, and participate in leadership training programs.<sup>17</sup> Associate members could attend all other meetings, voice concerns, and express their own opinions.<sup>18</sup>

One of the central issues before the Court was whether Minnesota could apply its public accommodation law to the Jaycees and compel it to admit women to full member status.<sup>19</sup> The Minnesota public accommodation law prohibited any organization from denying women, among other groups, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation.<sup>20</sup>

In response to the Jaycees' claim that it was entitled to discriminate against women in its membership selection, the Court delineated two distinct association rights under the First Amendment: intimate<sup>21</sup> and expressive. With respect to the Jaycees' claim to expressive association, the Court preliminarily analyzed the rationale behind preserving this right. It noted that an individual's right to speak, worship, and petition the government for the redress of grievances could not be protected from state interference unless a correlative freedom to engage in group effort towards those ends was not also guaranteed.<sup>22</sup> The Court added, "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."<sup>23</sup> The Court also noted:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept

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13. *Id.* at 612.

14. *See id.* at 616-17.

15. *See id.* at 613-14.

16. *See id.* at 613.

17. *See id.*

18. *See id.* at 621.

19. *See id.* at 612.

20. *See* MINN. STAT. §363.03 Subd. 3 (1991).

21. *See Roberts*, 468 U.S. at 617-18. This Note will limit its analysis to the right to expressive association.

22. *See id.* at 622.

23. *Id.* (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-909, 932-933 (1982); *Larson v. Valente*, 456 U.S. 228, 244-246 (1982); *In re Primus*, 436 U.S. 412, 426 (1978); *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977)).

members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association, therefore, plainly presupposes a freedom not to associate.<sup>24</sup>

The Court then established the standard for determining when a group was entitled to expressive association as a defense to a state's public accommodation law. First, the group had to be engaged in activity protected by the First Amendment.<sup>25</sup> It then had to show how the forced inclusion of the unwanted member would significantly impede its ability to disseminate its message. But the Court was quick to note that this right to expressive association was not absolute. Rather, "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."<sup>26</sup> Thus, the Court applied a balancing test, weighing the state's interest on one side and the group's interest in communicating its message on the other.

Applying this standard, the Court held that since the Jaycees advocated a number of political and public causes, as well as provided management and leadership training to its members, it was engaged in expressive activity.<sup>27</sup> The Court then held that Minnesota had a compelling interest in eradicating discrimination against women, since women had a history of being economically disadvantaged.<sup>28</sup> The Court ultimately found that the Jaycees failed to show how the integration of women, as full members, would significantly impede its ability to pursue "educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States."<sup>29</sup> It held that since the Jaycees already had women participants, changing the status of a woman from associate to full voting-member status would, at most, incidentally affect its expression.<sup>30</sup> Rejecting the Eighth Circuit Court of Appeals rationale that women *could* affect the expression of the Jaycees as speculative, the Court held that there was no evidence to support the proposition that if enough women became voting members they would in fact vote on issues disadvantageous toward young men.<sup>31</sup> Thus, since the Jaycees failed to meet its burden, the *Roberts* balancing test was tipped in favor of Minnesota's interest in eradicating discrimination against women.

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24. *Roberts*, 468 U.S. at 623.

25. *See id.* at 622.

26. *Id.*

27. *See id.* at 626-27.

28. *See id.* at 623, 626.

29. *Id.* at 612 (quoting Appellee's Brief at 2).

30. *See id.* at 627.

31. *See id.*

***Board of Directors of Rotary International v. Rotary Club of Duarte***

In *Board of Directors of Rotary International v. Rotary Club of Duarte*,<sup>32</sup> the Court was faced with the precise issue it faced in *Roberts*: whether a state's public accommodation law prohibiting all-male clubs from discriminating against women unconstitutionally infringed on the Rotary Club's right to freedom of association.<sup>33</sup> Addressing Rotary Club's expressive association claim, the Court echoed *Roberts* and found that the Rotary Club was indeed an expressive association since it, as the Jaycees, advocated many political and public causes.<sup>34</sup> The Court then applied the *Roberts* balancing test; it found that California had a compelling interest in eliminating discrimination against women;<sup>35</sup> it then found that the Rotary Club failed to prove how the forced inclusion of a woman would significantly impede its message.<sup>36</sup> The Court concluded that since Rotary Club failed to meet its burden, the balancing test tipped in favor of California's interest in eradicating discrimination against women. With respect to the expressive association standard, *Rotary Club* merely reiterated the ad hoc balancing test established in *Roberts*.

***New York State Club Association v. New York City***

Just one year after deciding *Rotary Club*, the Supreme Court decided a third case dealing with the conflict between a group's claim to expressive association and a state's antidiscrimination law. In *New York State Club Association v. City of New York*,<sup>37</sup> the New York State Club Association challenged the constitutionality of New York City's Human Rights Law ("HRL")<sup>38</sup> on the basis it was overly broad.<sup>39</sup> Although this law initially exempted "any institution, club or place of accommodation which proves that it is in its nature distinctly private,"<sup>40</sup> a 1984 amendment provided that any institution, club or place of accommodation, other than a benevolent order or a religious corporation, shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, etc., directly or indi-

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32. 481 U.S. 537 (1987).

33. See *id.* at 539.

34. See *id.* at 548.

35. See *id.* at 549.

36. See *id.* at 549 n.8.

37. 487 U.S. 1 (1988).

38. Also known as "Local Law No. 97 of 1965." See *New York State Club Ass'n*, 487 U.S. at 4 n.1.

39. *New York State Club Ass'n*, 487 U.S. at 11.

40. *Id.* at 5 (quoting N.Y.C., N.Y., ADMIN. CODE § 8-102(9)(1986)).

rectly from or on behalf of nonmembers for the furtherance of trade or business.<sup>41</sup>

While the Court focused its analysis on the facial challenge to the HRL, it also addressed and abruptly rejected the State Club Association's expressive association argument. It held that most large clubs subject to the HRL will not be able to show that they were "organized for specific expressive purposes and will not be able to advocate . . . [their] desired viewpoints nearly as effectively if [they] cannot confine [their] membership[s] to those who share the same sex, for example, or the same religion."<sup>42</sup> Since the Club facially challenged the HRL, the Court refused to provide constitutional protection to the Club, "let alone a substantial number of them,"<sup>43</sup> unless it could identify other organizations that may be adversely affected by New York's law. Although the Club was unsuccessful in showing how other organizations may have been affected by New York's HRL, the Court suggested that it might allow a more expansive reading of associational freedoms if a club could make a fact-based claim indicating how the unwanted member would significantly impede its message.<sup>44</sup>

***Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston***<sup>45</sup>

In 1992, a group of gay, lesbian, and bisexual descendants of Irish immigrants formed the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") for the express purpose of marching in the South Boston St. Patrick's Day-Evacuation Day Parade.<sup>46</sup> In 1993, after the South Boston Allied War Veterans Council (Council) denied GLIB's application to march in the parade, GLIB brought suit claiming that the Council's discriminatory acts violated state and federal constitutions as well as a Massachusetts's public accommodation statute.<sup>47</sup> The Council denied admission to GLIB "as its own parade unit carrying its own banner."<sup>48</sup> While the parade took place in public, the Court held that the Council's selection process for marching units was not a public accommodation.<sup>49</sup> Rather, the Court held that since pa-

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41. *Id.* at 6 (quoting N.Y.C., N.Y., ADMIN. CODE § 8-102(9)(1986)).

42. *Id.* at 13.

43. *Id.* at 14.

44. *See id.* at 20-23.

45. 515 U.S. 557 (1995).

46. *See id.* at 561.

47. Massachusetts' public accommodations law prohibited "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." *See id.* (quoting MASS. GEN. LAWS ch. 272 §98 (1992)).

48. *Hurley*, 515 U.S. at 572.

49. *See id.* at 573.



rades are inherently expressive in nature,<sup>50</sup> and since GLIB would be actively sending a pro-gay message, the Council's rejection of GLIB was an exercise of free speech.<sup>51</sup> Since freedom of speech also entails the freedom not to speak, the Court unanimously held that by forcing the Council to accept GLIB would infringe upon its right to define its voice.<sup>52</sup>

In addressing the Council's purported right to freedom of expressive association, the Court reiterated the holding in *New York State Club Association*, stating that "[i]f [it] were to analyze this case strictly along [freedom of expressive association] lines, GLIB would lose."<sup>53</sup> It added, "GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members."<sup>54</sup> Since GLIB's presence would significantly impede the Council's speech, the Council was justified in denying GLIB its request to march in the parade.

Although *Hurley* focused on the Council's right to freedom of speech, its brief analysis on expressive association implicitly added an important component to the *Roberts* test. *Hurley* suggested that not only is an expressive association entitled to the right to communicate the message of its choice, it may also be entitled to define its voice through the selection of its members.<sup>55</sup> The Court held that since parades are inherently expressive activities,<sup>56</sup> and since viewers of private parades are likely to believe that the organizers of a parade select marchers that communicate messages it approves,<sup>57</sup> then GLIB's mere presence would be sending a message that the Council approves the gay, lesbian, and bisexual movement.<sup>58</sup> Although the Council had no expressive purpose specifically against the homosexual movement, the Court, with little analysis, nonetheless held that the Council's discriminatory action was protected under the right of expressive associ-

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50. The Court stated, "symbolism is a primitive but effective way of communicating ideas." *See id.* at 569 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)). The Court added that "[s]ince all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.* at 573 (quoting *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 11 (1986)(plurality opinion)).

51. *See id.* at 573.

52. "The selection of contingents to make a parade is entitled to [First Amendment] protection." *Id.* at 570.

53. *Id.* at 580.

54. *Id.* at 580-81.

55. *See id.* at 569-70.

56. *See id.* 573.

57. *See id.* at 574-75.

58. *See id.*

ation.<sup>59</sup> Curiously, the Court did not require the Council to show how the forced inclusion of GLIB would significantly affect its ability to disseminate its message, as required by *Roberts*.<sup>60</sup> Rather, the Council merely had to show that it disagreed with GLIB's message. Although *Hurley* suggests that certain organizations are entitled to discriminate under the right to expressive association or freedom of speech, it failed to identify the triggering factors to either standard.

### III. *BOY SCOUTS OF AMERICA v. DALE*: FACTUAL BACKGROUND AND PROCEDURAL POSTURE

James Dale became involved with the Boy Scouts of America by joining the Cub Scouts in 1978 at the age of eight.<sup>61</sup> After three years, Dale became a Boy Scout.<sup>62</sup> In 1988, Dale achieved the rank of Eagle Scout, one of Scouting's highest honors.<sup>63</sup>

In 1989, Dale applied for adult membership as a leader in the Boy Scouts. The Boy Scouts approved his application, which was for the position of assistant scoutmaster of Troop 73. That same year, Dale left home to attend Rutgers University.<sup>64</sup> After arriving, Dale publicly acknowledged that he was gay. Soon Dale became the co-president of the Rutgers University's Lesbian/Gay Alliance. The next year Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. After that seminar, a newspaper interviewed Dale about his advocacy of homosexual teenagers' need for gay role models.<sup>65</sup> In July 1990, the newspaper published that interview, along with Dale's photograph. The caption above the photograph identified Dale as the co-president of the Lesbian/Gay Alliance.<sup>66</sup> That same month, the Monmouth Council Executive James Kay sent Dale a letter informing him that his membership had been revoked. When Dale wrote to obtain the reason for the Council's decision, Kay responded by stating that the Boy Scouts "specifically forbid membership to homosexuals."<sup>67</sup>

In 1992, Dale filed a complaint with the New Jersey Superior Court against the Boy Scouts for violating New Jersey's public accommodation statute by revoking Dale's membership solely on his sexual orientation. Among other things, New Jersey's public accommodation

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59. *See id.* at 580.

60. *See supra* notes 12-31 and accompanying text.

61. *See Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2449-50 (2000).

62. *See id.* at 2449-50.

63. *See id.* at 2450.

64. *See id.*

65. *See id.*

66. *See id.*

67. *Id.* (citation omitted).

statute prohibits discrimination on the basis of sexual orientation in places of public accommodation.<sup>68</sup>

The New Jersey Superior Court's Chancery Division granted summary judgment in favor of the Boy Scouts, and held that "New Jersey's public accommodations law was inapplicable because the Boy Scouts was not a place of public accommodation, and that, alternatively, the Boy Scouts is a distinctly private group exempted from coverage under New Jersey's law."<sup>69</sup> The court also held that the Boy Scouts' position with respect to active homosexuality was clear and held that the First Amendment freedom of expressive association bared the government from forcing the Boy Scouts to accept Dale as an adult leader.<sup>70</sup> On appeal, the New Jersey Superior Court Appellate Division reversed and remanded for further proceedings. It held that "New Jersey's public accommodations law applied to the Boy Scouts and that the Boy Scouts violated it."<sup>71</sup> The Appellate Division rejected the Boy Scouts' federal constitutional claims.<sup>72</sup>

The New Jersey Supreme Court affirmed the judgment of the Appellate Division and held that

the Boy Scouts was a place of public accommodation subject to the public accommodations law, that the organization was not exempt from the law under any of its express exceptions, and that the Boy Scouts violated the law by revoking Dale's membership based on his avowed homosexuality.<sup>73</sup>

The court then addressed whether New Jersey's public accommodation law unconstitutionally infringed on First Amendment rights "to enter into and maintain . . . intimate or private relationships . . . [and] to associate for the purpose of engaging in protected speech."<sup>74</sup>

The court rejected the Boy Scouts' intimate association claim on the grounds the Boy Scouts was a large, nonselective group that was inclusive rather than exclusive, and also had a practice of inviting or allowing nonmembers to attend its meetings.<sup>75</sup> The court also rejected the Boy Scouts' claim to expressive association. The court "agree[d] that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members;"<sup>76</sup> however, it "concluded that it was 'not persuaded . . . that a shared goal of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral.'"<sup>77</sup> As a result, "the court held 'that

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68. *See id.*

69. *Id.*

70. *See id.* at 2450.

71. *Id.*

72. *See id.*

73. *Id.*

74. *Id.* (citation omitted).

75. *See id.*

76. *Id.*

77. *Id.* (citation omitted).

Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.'"<sup>78</sup> It also held that "New Jersey has a compelling interest in eliminating' the destructive consequences of discrimination from our society, and that its public accommodation law abridges no more speech than is necessary to accomplish its purpose."<sup>79</sup>

Finally, the court addressed the Boy Scouts' reliance on *Hurley* in support of its alleged right to exclude Dale under the First Amendment.<sup>80</sup> The court determined that *Hurley* did not require deciding the case in favor of the Boy Scouts because "the reinstatement of Dale does not compel the Boy Scouts to express any message."<sup>81</sup>

Applying *Hurley*, the Court found that the forced inclusion of Dale, as a homosexual, would significantly impede the Boy Scouts' ability to teach values.<sup>82</sup> It further reasoned that if the Boy Scouts opposed homosexuality as a legitimate form of behavior, and if scoutmasters teach by example, it necessarily follows that a homosexual scoutmaster would send contradictory messages to scouts.<sup>83</sup> Although the Court did cursorily address the overbreadth of New Jersey's public accommodation law,<sup>84</sup> it was silent with respect to whether New Jersey had a compelling interest in eradicating discrimination against homosexuals.

The dissent conceded that the Boy Scouts was an organization engaged in expressive activity, but sharply disagreed with the majority's use of *Hurley* as the proper standard for expressive associational claims.<sup>85</sup> Rather, the dissent opined that the *Roberts* balancing test should apply, weighing the Boy Scouts' interest in preserving its ability to disseminate its message against New Jersey's interest in eradicating discrimination. Addressing the Boy Scouts' interest, the dissent held that courts should question the sincerity of the organization claiming the right to expressive association by refusing to give such any deference.<sup>86</sup> Rather than trust the assertions made by an organization, courts should make an independent determination as to whether the private group's expressive purpose was connected to its exclusionary policy; and its own determination as to whether the unwanted person would significantly affect the group's ability to disseminate its message.

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78. *Id.*

79. *Id.* at 2450-51.

80. *See id.*

81. *Id.*

82. *See id.* at 2455.

83. *See id.*

84. *See id.*

85. *See id.* at 2474-76 (Stevens, J., dissenting).

86. *See id.* at 2471.

Applying the *Roberts* balancing test, the dissent opined that Dale's mere presence would not force the Boy Scouts to send a message to the world, or to scouts, that it embraced homosexuality as a legitimate form of behavior.<sup>87</sup> According to the dissent, the Boy Scouts' expressive purpose was to teach general values such as courage, reverence, and obedience to parents. Since the Boy Scouts was not created specifically to teach scouts that homosexuality was immoral, the dissent was unconvinced that the Boy Scouts' expressive purpose would be significantly impeded by Dale's presence.<sup>88</sup> The dissent held that even if Dale's presence would send a contrary message, it would be so incidental that the *Roberts* balancing scale would still be tipped in favor of New Jersey's interest in eradicating discrimination.<sup>89</sup>

#### IV. ANALYSIS

*Boy Scouts of America v. Dale* illustrates that the proper standard to be applied in cases dealing with a private organization's claim to expressive association as a defense to a state's public accommodations law is yet unresolved.<sup>90</sup> This section of the Note will first argue that the majority's application of *Hurley* provides far too much protection to organizations engaged in activities not independently protected by the First Amendment. The section will then argue that the dissent's heightened standard provides far too little protection to groups engaged in purely expressive association. This section of the Note will conclude by recommending a standard that reconciles these seemingly competing standards.

##### A. The Majority's Standard is Over-protective

The majority in *Dale* implicitly established that an organization engaged in *some* expressive activity is entitled to absolute protection from state public accommodation laws if it can simply show that the forced inclusion of the unwanted member would significantly affect its

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87. See *id.* at 2475 (Stevens, J., dissenting).

88. See *id.*

89. See *id.*

90. Some commentators have argued that even after the Supreme Court established the *Roberts* balancing test, the manner in which state antidiscrimination laws may impinge on associational practices still remains a mystery. See William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U.L. REV. 68, 68-69 (1986) (discussing how *Roberts* was the only case where the Supreme Court squarely addressed the conflict between a private organization and a state's antidiscrimination law; and yet *Roberts* did not establish a per se rule for dealing with this conflict); Devins, *supra* note 8, at 910 (discussing how the *Roberts* ad hoc balancing test is vulnerable to subjectivity). This Note argues that that even after the Supreme Court decided *Dale*, the proper weight courts should assign private organizations and to states under the *Roberts* balancing test is still unclear.

ability to disseminate its message, despite any compelling state interest. The majority facially analyzed *Dale* under a freedom of expressive association analysis. A close look at its opinion, however, reveals that it diverged from *Roberts* by failing to weigh New Jersey's interest, as well as by giving unqualified judicial deference to the Boy Scouts' claims regarding how the forced inclusion of Dale would significantly affect its message.

After initially finding that the Boy Scouts was engaged in expressive activity since it was formed for "instill[ing] values in young people,"<sup>91</sup> the majority then applied the *Roberts* balancing test. It first weighed the Boy Scouts' interest in communicating its preferred message. The majority held that the Boy Scouts had the burden of showing how the forced inclusion of Dale, as a homosexual, would significantly impede its ability to disseminate its message.<sup>92</sup> The majority was persuaded by the Boy Scouts' assertion that Dale's mere presence would seriously impede its message of instilling values in youth because, according to the Boy Scouts, homosexuality is immoral. The majority held that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and to the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."<sup>93</sup>

Despite the majority's analysis of the Boy Scouts' interest in communicating its message, however, the majority ended its expressive association analysis without considering New Jersey's interest in eradicating discrimination, as required under *Roberts*. Instead, the majority applied the freedom of speech standard espoused by the Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.<sup>94</sup> In *Hurley*, the Court held that a private organization need only show how the forced inclusion of the unwanted member significantly affects its ability to communicate its message; the state's interest did not play a role in the Court's analysis.<sup>95</sup>

In addition, the majority also failed to specify what types of organizations are entitled to "judicial deference." Citing *Democratic Party of United States v. Wisconsin ex rel. LaFollette*,<sup>96</sup> the majority held that courts must give deference to expressive organizations' claims with respect to how its exclusionary policy is connected to its expressive purpose, as well as deference as to the group's view of how the unwanted member would impede its ability to disseminate its preferred mes-

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91. *Dale*, 120 S. Ct. at 2452.

92. *See id.* 2454-55.

93. *Id.* at 2454.

94. 515 U.S. 557 (1995).

95. *See id.*; *supra* notes 45-60 and accompanying text.

96. 450 U.S. 107 (1981).

sage.<sup>97</sup> Providing deference to a group engaged in merely *some* expressive activity essentially eliminates that group's burden under *Roberts*.

For example, take an organization created for the purpose of conducting seminars in order to educate people about overcoming poverty. To raise money, this organization sells manufactured goods door to door, and is very profitable. This same organization has a policy that denies membership to blacks. Under the majority's requirement, courts would have to give this organization deference even if the organization claimed it denies membership to blacks in order to communicate its preferred message that whites are superior. In addition, under this standard courts must also give deference to this organization's view as to how the black member would significantly affect its ability to disseminate its message that whites are superior. Indeed, the majority's deference would not conduct an independent inquiry into the sincerity of the organization's assertions. Thus, the majority's standard would essentially give any organization engaged in *some* expressive activity maximum First Amendment protection.

The majority's position is mistaken, however, since not every type of organization is entitled to this much First Amendment protection. While the Supreme Court in *Roberts* implied that certain expressive associations are entitled to discriminate despite any compelling state interest,<sup>98</sup> it has also recognized that other expressive associations are entitled to no such protection.<sup>99</sup> Expressive association is the right to associate for the purpose of engaging in activities independently protected by the First Amendment.<sup>100</sup> Thus, if an organization is engaged in merely *some* expressive activity, it may not be entitled to as much protection as an organization engaged in completely, or substantially complete, expressive activity. The majority's unqualified defer-

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97. See *id.* at 124-26.

98. See *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). There is also authority supporting the proposition that a private group is entitled to discriminate, despite a compelling state interest, if the forced inclusion of the unwanted member significantly impedes the group's message. See *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281 (D. Md. 1988) (holding that the KKK was allowed to discriminate against a black since the forced inclusion of a black person as a member would significantly affect its ability to disseminate its message that the white race was, in its view, superior); see also Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377, 390-97 (discussing that *Hurley* strongly suggests that it's quite possible that in some situations antidiscrimination laws might indeed violate First Amendment expressive association rights).

99. See *supra* notes 12-60 and accompanying text for examples of expressive organizations that were denied protection under the First Amendment.

100. See *Roberts*, 468 U.S. at 618; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.41, at 1065 (4th ed. 1991).

ence to private organizations that engage in merely some expressive activity provides far too much protection to private organizations that discriminate in contravention of a state's antidiscrimination laws.

## B. The Dissent's Heightened Standard is Under-protective

The dissent rejected the majority's conclusion on two grounds. First, the dissent claimed *Hurley* was inapplicable since it addressed the right to freedom of speech and not the right to expressive association.<sup>101</sup> According to the dissent, the right to freedom of speech is a much lighter burden since under this standard groups must merely show how the inclusion of an unwanted member would significantly impede its message. To qualify for this standard, an organization must show that it seeks to disseminate a certain message at a given time, place, or manner.<sup>102</sup> According to the dissent, the freedom of speech analysis was inappropriate in *Dale* since the Boy Scouts was not claiming the right to communicate a specific message at a particular time or place;<sup>103</sup> rather, it was claiming a right to communicate a certain message over a period of time and in a number of places. Thus, the dissent held that the appropriate standard to apply was the *Roberts* balancing test. To this end it was correct.<sup>104</sup>

Next, the dissent sharply disagreed with the majority's claim that courts should give deference to expressive organizations as to how the group's exclusionary policy is connected to its expressive purpose, as well as deference to the group's view as to how the forced inclusion of the unwanted member would significantly affect its message.<sup>105</sup> The dissent claimed that if courts gave this deference, organizations could arbitrarily discriminate against a member for any reason. Thus, in determining how the unwanted person would affect the organization's message under the *Roberts* test, courts should question the sincerity of the organization by conducting an independent analysis that looks be-

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101. See *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2476 (2000) (Stevens, J., dissenting).

102. See *id.*

103. See *id.*

104. But see *infra* notes 109-153 and accompanying text (noting that although the dissent facially applied the proper standard, it nonetheless departed from that standard by placing heightened requirements on private organizations).

105. The dissent stated:

[T]he majority insists that we must "give deference to an association's assertions regarding the nature of its expression" and "we must also give deference to an association's view of what would impair its expression." So long as the record "contains written evidence" to support a group's bare assertion, "[w]e need not inquire further." Once the organization "asserts" that it engages in particular expression "[w]e cannot doubt" the truth of that assertion.

*Dale*, 120 S. Ct. at 2470-71 (Stevens, J., dissenting)(quoting the majority in part)(quotations original)(internal citations omitted).



yond the mere assertions made by the organization claiming the right to expressive association.<sup>106</sup>

In its zeal to check the sincerity of an organization's sincerity, the dissent opined that a group must not only demonstrate that it is engaged in expressive activity, but must also 1) have a narrowly defined and unequivocal expressive purpose<sup>107</sup> and, 2) have a publicly expressed exclusionary policy.<sup>108</sup> A brief analysis of these heightened requirements illustrates that the dissent's standard makes it virtually impossible for groups formed for general expressive purposes, such as the Boy Scouts, to be protected from state antidiscrimination laws under the First Amendment's right to expressive association.

### **Heightened Requirements as an Increased Burden on Private Organizations**

#### *a. The Requirement that a Group Have a Narrowly Defined and Unequivocal Expressive Purpose*

The dissent's first heightened requirement is that the group claiming the right to expressive association must have a narrowly defined and unequivocal expressive purpose.<sup>109</sup> But the Supreme Court has specifically held that "a narrow, succinctly articulable message is not a condition of constitutional protection," such that "a private [organization] does not forfeit constitutional protection simply by . . . failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."<sup>110</sup> The dissent's heightened requirement that a group narrowly define its expressive purpose is wholly unsupported by case law.

But even if this was a requirement, the manner in which the dissent applied it to the Boy Scouts makes it impossible to implement for any group, such as the Boy Scouts, formed for general expressive purposes. At one point, the dissent suggests that because the Boy Scouts had a general expressive purpose to instill values in youth and did not associate for the purpose of teaching youth scouts that homosexuality

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106. See *Dale*, 120 S. Ct. at 2463 (Stevens, J., dissenting).

107. The dissent claimed that a group must have a clear and unequivocal expressive purpose; however, its analysis plainly established that in order for an organization to have a "clear" expressive purpose it must show its expressive purpose was narrowly defined. It held, "there is no evidence that this view was part of any collective effort to foster beliefs about homosexuality." *Id.* at 2465.

108. See *id.* at 2463.

109. "To prevail in asserting a right of expressive association as a defense to a charge of violating an antidiscrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude." *Id.* at 2471.

110. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569-70 (1995).

was immoral, its expressive purpose would not be significantly impeded by Dale's presence since it could still teach youth values such as courage, obedience to parents, et cetera.<sup>111</sup> This concept implicitly asserts that an expressive association cannot have a general expressive purpose, such as the Boy Scouts' purpose to instill values in youth. Under the dissent's theory, the Boy Scouts would likely be required to narrow its expressive purpose by explicitly stating a list of "don'ts" in its Boy Scouts Handbook that fall outside its conception of morality.<sup>112</sup> This might look something like this:

**"SCOUT OATH:**

On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight\* . . .

**SCOUT LAW:**

A Scout is Trustworthy, Obedient, . . . Courteous, Clean,\*\* . . .

\*\* The following conduct is immoral and unclean behavior: Nude lap dancing; going to topless bars (even when the dancers are wearing pasties on their nipples); playing strip poker; acts of bestiality or incest; fondling one's penis; looking at girls' breasts and thinking dirty thoughts; viewing Playboy, Penthouse or Hustler Magazines; watching NC-17 movies that display penises, vaginas or a woman's breasts; bathing nude in the open; or surfing naked."

As one can see, it would be absurd to publish such a list in a handbook distributed to boys ranging between the ages of twelve to eighteen years if the boy is a Boy Scout, or age eight to eleven if the boy is a Cub Scout. And yet, under the dissent's heightened standard, this requirement is implied.

Further, part of the freedom of speech includes the freedom not to speak.<sup>113</sup> The Boy Scouts specifically addressed this in its Brief when it stated that "[t]he Boy Scouts explains that the Scout Oath and Law provide 'a positive moral code for living; they are a list of 'do's' rather than 'don'ts.'"<sup>114</sup> As will be discussed in more detail below, requiring the Boy Scouts to specifically list numerous acts it considers immoral would clearly violate its right to freedom of speech.<sup>115</sup>

In addition, a private group formed for general purposes such as the Boy Scouts cannot meet the dissent's requirement by specifically listing the types of conduct it is opposed to since such lists are no

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111. See *Dale*, 120 S. Ct. at 2460-63 (Stevens, J., dissenting).

112. "It is plain as the light of day that neither one of these principles - "morally straight" and "clean" - says the slightest thing about homosexuality. Indeed, neither term in the Boy Scouts' Law and Oath expresses any position whatsoever on sexual matters." *Id.* at 2461.

113. "Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986)(plurality opinion)(emphasis in original)).

114. See *Dale*, 120 S. Ct. at 2452 (quoting Petitioners' Brief at 3).

115. See *infra* notes 134-36 and accompanying text.

where near exhaustive. If the Boy Scouts discovered that a leader acting in a manner not explicitly prohibited in the list of "don'ts," the Boy Scouts would remain powerless to terminate his membership. For example, take the hypothetical list of prohibited activity listed above. If the Boy Scouts later learned that one of its leaders was a pimp, it could not revoke his membership since it failed to include the word "pimp" in its list of immoral behavior. Clearly, not every type of prohibited activity can be listed. Therefore, the dissent's claim that an organization's expressive purpose must be clearly and narrowly articulated is impossible to meet for organizations that are created for general expressive purposes such as the Boy Scouts.

The dissent also claimed that an organization must have an unequivocal expressive purpose. But the majority rejected this requirement by citing *Thomas v. Review Board of the Indiana Employment Security Division*,<sup>116</sup> where the Court held that an organization's "beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."<sup>117</sup> Although the *Thomas* Court addressed a religious organization, its rationale is nonetheless applicable to organizations engaged in purely expressive activity, as will be discussed in more detail below.<sup>118</sup>

Even if this requirement was valid, the manner in which the dissent applied it in *Dale* clearly illustrates how the *Roberts* ad hoc balancing test can be manipulated to get a desired outcome. This is evidenced by the dissent's reasons why it believed the Boy Scouts' policy regarding homosexuality was equivocal. But each of these reasons is wholly unsupported by the record.

First, the dissent claimed that while the Boy Scouts' "1991 and 1992 policies state one interpretation of 'morally straight' and 'clean,' the group's published definitions appearing in the *Boy Scout* and *Scoutmaster Handbooks* take quite another view."<sup>119</sup> But the Scout

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116. 450 U.S. 707 (1981).

117. *Id.* at 714.

118. See *infra* notes 156-162 (discussing how certain groups should be entitled to judicial deference with respect to its claim as to how its message would be impeded by the forced inclusion of the unwanted member). This Note argues that just as religious groups' expressive purpose need not be logical or internally consistent, neither should an organization that is engaged in purely expressive activity such as the Boy Scouts.

119. *Dale*, 120 S. Ct. at 2465 (Stevens, J., dissenting). The *Boy Scout Handbook* defines "morally straight" in the following manner: "[t]o be a person of strong character, guide your life with honesty, purity, and justice. . . . Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant." *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1203 (N.J. 1999)(quoting *BOY SCOUT HANDBOOK* 551 (10th ed. 1990)).

The *Boy Scout Handbook* defines "clean" in the following manner:

Oath,<sup>120</sup> Law,<sup>121</sup> and Boy Scout Mission Statement<sup>122</sup> are completely

A Scout keeps his body and mind fit and clean. . . . You never need to be ashamed of dirt that will wash off. . . . [But] [t]here's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts. Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. . . . [A scout] defends those who are targets of insults.

*Dale*, 734 A.2d at 1203 (quoting BOY SCOUT HANDBOOK, *supra*, at 561).

120. The Scout Oath states: "On my honor I will do my best [t]o do my duty to God and my country and to obey the Scout Law; [t]o help other people at all times; [t]o keep myself physically strong, mentally awake, and morally straight." *Dale*, 734 A.2d at 1202.

121. The Scout Law states:

**A Scout is TRUSTWORTHY.** A Scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can always depend on him.

**A Scout is LOYAL.** A Scout is true to his family, friends, Scout leaders, school, nation, and world community.

**A Scout is HELPFUL.** A Scout is concerned about other people. He willingly volunteers to help others without expecting payment or reward.

**A Scout is FRIENDLY.** A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs that are different from his own.

**A Scout is COURTEOUS.** A Scout is polite to everyone regardless of age or position. He knows that good manners make it easier for people to get along together.

**A Scout is KIND.** A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not harm or kill anything without reason.

**A Scout is OBEDIENT.** A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

**A Scout is CHEERFUL.** A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy.

**A Scout is THRIFTY.** A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property.

**A Scout is BRAVE.** A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.

**A Scout is CLEAN.** A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.

**A Scout is REVERENT.** A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

*Id.*

122. The Boy Scouts Mission Statement states:

It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.

*Id.*

consistent with the Boy Scouts' exclusionary policy.<sup>123</sup> The *Scout Handbook* and *Scoutmaster Handbook* both define morality in positive terms, rather than negative terms.<sup>124</sup> Even if the Boy Scouts' policy was silent with respect to homosexuals, which the record fails to support,<sup>125</sup> excluding homosexuals is not inconsistent with the Boy Scouts' assertion that homosexuality is not morally straight. In addition, as discussed above, silence is still protected under free speech analysis.

Next, since the Boy Scouts has a broad religious tolerance, the dissent claimed its expressive purpose and exclusionary policy are inconsistent since some religions do not view homosexuality as immoral.<sup>126</sup> But this argument completely misses the point since the exclusionary policy precludes homosexuals that seek to be *adult leaders*, not homosexual *youth scouts*.<sup>127</sup> The distinction is an important one. Under the Boy Scouts' claim, a scout leader should be a positive role model to youth scouts. Assuming that the Boy Scouts thinks homosexuality is immoral, its view that a homosexual leader would send a mixed message that homosexuality was an appropriate form of behavior is quite consistent with its exclusionary policy. Although youth scouts may influence fellow scouts, they are not required to be role models. Thus, for the purposes of *Dale*, it is not consistent for the Boy Scouts to have a policy against homosexuality, while at the same time having a broad religious tolerance.

The dissent could have argued, but did not, that since a youth scout leader could be a role model for his peers, instructing a youth scout to follow his religion would be contradictory. This argument might undermine the Scouts position since the Boy Scouts' recommendation for youth to follow their religions is most likely geared at guiding these youth to attain a certain moral ideal. But this scenario only poses a problem for the Boy Scouts if a court further accepts the assumption that many religions advocate, not merely tolerate, homosex-

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123. A 1978 position statement to the Boy Scouts' Executive Committee, signed by Downing B. Jenks, the President of the Boy Scouts, and Harvey L. Price, the Chief Scout Executive, expresses the Boy Scouts' "official position" with regard to "homosexuality and Scouting":

Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.

*Dale*, 120 S. Ct. at 2453.

124. See *id.* at 2461 (Stevens, J., dissenting).

125. See *id.* at 2453.

126. See *id.* at 2463 (Stevens, J., dissenting).

127. See *id.* at 2453.

uality. But it is unlikely that many religions, if any, take this position. It is more likely that while some religions accept homosexuals and may even allow a homosexual to participate in meetings or hold positions of responsibility, most religions do not advocate homosexuality as a moral ideal. Thus, even if *Dale* dealt with excluding youth scout leaders, which it does not, it is illogical to claim the Boy Scouts' policy with regards to homosexuals is equivocal on the basis it encourages its youth scouts to follow their religion.

Third, the dissent noted that the Boy Scouts' policy against homosexuals was inconsistent with its goal to strive for a "representative membership."<sup>128</sup> Since the Boy Scouts defines representative membership as "boy membership [that] reflects proportionality the characteristics of the boy population of its service area,"<sup>129</sup> the dissent implied that the Boy Scouts' policy should include homosexuals because some of the boy population is most likely homosexual. A common sense interpretation of this policy, however, is that the Boy Scouts seek a representative membership with regards to economic, cultural, ethnic, and religious background. Implying that the Boy Scouts representative membership policy should embrace homosexual boys since some of the population of young boys between the ages of 12-17 may be homosexual is very problematic. Under this interpretation, the Boy Scouts would also be required to include young members who look at pornography, have unprotected premarital sex, or other acts the Boy Scouts may consider "immoral," since some young men between the ages twelve and seventeen may engage in these activities. This interpretation of "representative membership" would effectively preclude the Boy Scouts from revoking the membership of boys engaged in these types of activities, an absurd conclusion. But more importantly, as mentioned above, the Boy Scouts' exclusionary policy prohibits homosexuals from becoming *adult leaders*; it makes no reference whatsoever to excluding a *youth* homosexual. Thus, this argument is completely irrelevant.

Finally, the dissent claimed that the Boy Scouts' 1978 policy on homosexuality was facially equivocal, since it both prohibited homosexuals from being adult members, while simultaneously requiring its

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128. The dissent stated:

BSA describes itself as having a "representative membership," which it defines as "boy membership [that] reflects proportionately the characteristics of the boy population of its service area." In particular, the group emphasizes that "[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy . . . . To meet these responsibilities we have made a commitment that our membership shall be representative of all the population in every community, district, and council.

*Dale*, 120 S. Ct. at 2460 (citations omitted)(Stevens, J., dissenting).

129. *Id.*

executives to admit homosexuals as leaders if the law so required.<sup>130</sup> The policy states that the Boy Scouts deny professional or nonprofessional leadership positions to homosexuals unless the law prohibits such.<sup>131</sup> This statement explicitly states that it is opposed to homosexuals as leaders. The *exception* is that if the law prohibits discrimination in such a manner, the Boy Scouts should first abide by the law and then *seek to change it*.<sup>132</sup> The inconsistency is anything but apparent. Holding the Boy Scouts' policy facially equivocal essentially penalizes it for adhering to the philosophy: "it is better to be safe [obey the law and then peacefully try to change it], than sorry."

*b. The Requirement that the Exclusionary Policy be Publicly Expressed.*

The dissent also required that an organization show it made its exclusionary policy publicly expressed.<sup>133</sup> Ironically, this requirement forces an organization to speak out on matters it is against in order to preserve the right to expressive association. But placing this requirement on the Boy Scouts clearly violates its First Amendment right to freedom of speech. The Supreme Court has held that implicit in the notion of having a freedom to speak is a group's right to choose not to speak.<sup>134</sup> Compelling a group to speak about conduct it is fundamentally opposed to violates this right in its most obvious form.<sup>135</sup> The Boy Scouts have explicitly expressed that it refrains from discussing sexual matters with its scouts.<sup>136</sup>

But even if a private organization was required to publicize its exclusionary policy, the public was on sufficient notice of the Boy Scouts'

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130. *See id.* at 2463-64 (Stevens, J., dissenting).

131. *See id.*

132. *See id.*

133. "[T]he [Boy Scouts'] 1978 policy [on homosexuality] was never publicly expressed. . . . It was an internal memorandum, never circulated beyond the few members of BSA's Executive Committee. It remained, in effect, a secret Boy Scouts policy." *Id.*

134. *See Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988).

135. *See People v. FCC*, 75 F.3d 1350 (9<sup>th</sup> Cir. 1996) *cert. denied*, 517 U.S. 1216 (1996)("[t]he First Amendment protects persons from being compelled to express 'adherence to an ideological point of view they find unacceptable'")(citing *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977)); *see also* 16A AM. JUR. 2D *Constitutional Law* § 463 (1998).

136. The *Boy Scout Handbook* states:

You may have boys asking you for information or advice about sexual matters. . . . How should you handle such matters?

Rule number 1: You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area . . . .

*Dale*, 120 S. Ct. at 2462 (Stevens, J., dissenting).

stance on homosexuality.<sup>137</sup> While every United States citizen probably was not aware of these lawsuits, they were nonetheless public information. As Chief Justice Rehnquist stated, "[t]he fact that the organization does not trumpet its views from the housetops . . . does not mean that its views receive no First Amendment protection."<sup>138</sup>

In sum, the dissent added heightened requirements to the traditional *Roberts* balancing test, resulting in an increased burden on private organizations. Even if these were required, the record clearly shows the Boy Scouts met each requirement. The dissent's application of the *Roberts* ad hoc balancing test further evidences the ease in manipulating that standard to achieve a desired outcome.

### Back to the Traditional *Roberts* Test

After applying its heightened requirements, the dissent then returned to the traditional *Roberts* test, determining whether the Boy Scouts had proved that the forced inclusion of Dale as a scout leader would significantly affect its ability to disseminate its message. The dissent held that Dale would not send any message that homosexuality was a legitimate form of behavior.<sup>139</sup> Since there was no evidence that Dale had ever discussed his homosexuality with anyone in the Boy Scouts prior to that time, the dissent opined that he would not advocate that position in the future.<sup>140</sup> But this argument is fundamentally flawed for several reasons.

First, it fails to recognize that Dale's mere presence would send a message that homosexuality was a moral form of conduct. Dale himself had, just prior to sending in his application for a renewed membership, made a conscious decision to "come out of the closet" and join a pro-gay activist organization at the college he attended.<sup>141</sup> Thus, Dale's mere presence would be sending a message; more importantly, his mere presence would pose a significant threat to the Boy Scouts' ability to limit its verbal speech to non-sexual matters.

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137. See *id.* at 2453 (citing *Curran v. Mount Diablo Council of the Boy Scouts of America*, C-365529 (Cal. Super. Ct. July, 25 1991); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 29 Cal. Rptr. 2d 580 (Cal. Ct. App. 1994), *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. 1998).

138. *Id.* at 2455.

139. The dissent claimed:

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.

*Dale*, 120 S. Ct. at 2475 (Stevens, J., dissenting).

140. See *id.* at 2476-77.

141. See *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1204 (N.J. 1999).



Next, the dissent's argument fails to view a scout leader's mere presence as communicating a message to scouts. The Supreme Court has consistently held that symbolic action is protected speech. But the dissent held that an individual must intend to communicate a certain message to be entitled to this symbolic speech.<sup>142</sup> Since the Boy Scout leaders did not intend to communicate a message by setting an example to youth scouts, the dissent held the Boy Scouts should not be entitled to the right to symbolic speech. This is erroneous, however, because the Boy Scouts' 1991 official statement states that its scout leaders are to be a good role model for scouts,<sup>143</sup> which further supports the Boy Scouts' claim that a scout leader's example is intended to communicate a message. In addition, the *Boy Scout Handbook* instructs its leaders that they are to teach by word and deed.<sup>144</sup>

Finally, the dissent's argument fails to recognize that Dale's mere presence would force the Boy Scouts to send a message that homosexuality is an appropriate form of behavior. The dissent argued that because many scoutmasters have political views the Boy Scouts may not support, and because certain leaders share these viewpoints with others, it is unreasonable for one to believe that that the Boy Scouts also shares these views. But this argument is only logical if the Boy Scouts was formed specifically for advancing a certain political ideology. Because the Boy Scouts' entire purpose is to instill values in youth, a homosexual leader permitted to remain in the ranks would unquestionably send a message that the Boy Scouts accepts homosexuality as a proper form of moral behavior.

Not only did the dissent create a heightened standard for private organizations, it also alleviated the state's burden in the *Roberts* balancing test. Organizations subject to this test face the daunting task of overcoming the state's "compelling" interest.<sup>145</sup> This can be daunting because it is almost inherently compelling to eradicate destructive discrimination from society. And yet this is precisely how the dissent in *Dale* framed New Jersey's compelling interest. It stated, "New Jersey prides itself on judging each individual by his or her merits and on being 'in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society.'"<sup>146</sup> This begs the question, however, by presupposing that the Boy Scouts' act of defining its membership is indeed unlawful or even harmful to society. But as discussed above, not all discrimination is harmful to society as a whole, or evil and unnecessary. Indeed, the First Amendment permits

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142. See *Dale*, 120 S. Ct. at 2475 (Stevens, J., dissenting).

143. See *id.* at 2453.

144. See *THE SCOUTMASTER HANDBOOK* 57 (1972).

145. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

146. *Dale*, 120 S. Ct. at 2459 (Stevens, J., dissenting)(quoting *Peper v. Princeton Univ. Bd. Of Trustees*, 389 A.2d 465, 478 (1978)).

and even encourages some forms of discrimination on the grounds that an individual's voice may not be heard unless it forms a group with those who share the same core values and/or ideologies.<sup>147</sup> Thus, certain types of discrimination are lawful and beneficial to society and to individuals.

In support of its proposition that New Jersey had a compelling interest in specifically eradicating discrimination against homosexuals, the dissent cited *Roberts v. United States Jaycees*,<sup>148</sup> *Runyon v. McCrary*,<sup>149</sup> *Hishon v. King & Spalding*,<sup>150</sup> and *Railway Mail Association v. Corsi*.<sup>151</sup> In each of these cases the state had a compelling interest in enacting public accommodation laws to "eliminate discrimination."<sup>152</sup> But the dissent's use of these cases is misguided because each dealt with either race or gender discrimination, which are clearly suspect classes. By framing New Jersey's compelling interest as eradicating discrimination, the dissent virtually would be creating an umbrella of protection for classes that have traditionally been denied constitutional protection. While women and racial minorities have been identified as suspect classes, the Supreme Court has never classified homosexuality in this category.<sup>153</sup> Under the dissent's standard, a Christian organization that denied membership to an individual wearing a shirt bearing a picture of the "Piss-Christ" would lose, since the state would have a compelling interest in eradicating discrimination on the basis of appearance as indicated in its state's antidiscrimination law. While appearance has never been a suspect, or even protected, class triggering the compelling interest analysis, the manner in which the dissent framed New Jersey's interest would essentially provide traditionally unprotected groups with the highest protection.

In sum, the dissent's heightened standard creates an increased burden on private organizations under the guise of the *Roberts* balancing test, while alleviating the state's burden to show a compelling interest. Although its concern regarding the wide-sweeping protection created by the majority's standard was well justified, the dissent's standard is nonetheless a swing in the wrong direction. It essentially

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147. See *Roberts*, 468 U.S. at 623.

148. See *id.*

149. 427 U.S. 160, 175-176 (1976).

150. 467 U.S. 69, 78 (1984).

151. 326 U.S. 88, 93-94 (1945).

152. See *Dale v. Boy Scouts of America*, 120 S. Ct. 2446, 2467 n. 10-12 (2000) (Stevens, J., dissenting).

153. See Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 Md. L. Rev. 450, 475-76 (1994) (noting that very few courts have analyzed sexual orientation as a suspect class).

precludes many private organizations that were formed for general expressive purposes from securing the right to expressive association.

### C. A Proposed Standard

This section of the Note proposes a standard that reconciles the seemingly opposing standards set out by the majority and the dissent in *Dale*. Specifically, this section argues that courts should first identify the quality of organization claiming the right to expressive association by looking at the group's purpose, as well as its predominant activities. Then, depending on these two factors, courts should apply one of four levels of scrutiny to determine when an organization's claim to expressive association should prevail over a state's interest in eliminating discrimination, or vice-versa.

In her concurring opinion in *Roberts*, Justice O'Connor insightfully noted that the Court should first determine whether the organization was significantly dedicated to First Amendment activity or whether it was primarily a commercial organization that only incidentally exercised first amendment rights.<sup>154</sup> This requirement is logical considering the right to expressive association is conditioned on whether the group is engaging in activities independently protected by the First Amendment. Justice O'Connor pointed out, however, that "[m]any associations cannot readily be described as purely expressive or purely commercial."<sup>155</sup> Indeed, many associations will fall somewhere in between this two positions. While Justice O'Connor did not suggest a sliding scale of protection for groups that may engage in limited, quasi, or purely expressional association, her insight was important nonetheless.

In determining whether an organization should be entitled to maximum First Amendment protection, the first step courts should take is to identify the purpose and predominant activity of the organization. This step should be done prior to applying the *Roberts* balancing test because, as will be seen below, depending on the type of expressive activity an organization is engaged in will determine whether that group will be immune from a state's interest in eradicating discrimination. In addition, under the proposed standard, only organizations dedicated to First Amendment activity should be given judicial deference.

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154. See *Roberts v. United States Jaycees*, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring) ("The Court entirely neglects to establish at the threshold that the Jaycees is an association whose activities or purposes should engage the strong protections that the First Amendment extends to expressive associations.").

155. *Id.* at 635 (O'Connor, J., concurring).

## Purely Expressive Associations Deserve the Highest Constitutional Protection

Purely expressive associations should be afforded the highest constitutional protection.<sup>156</sup> These groups are those formed for, and engaged predominately in, constitutionally protected speech or conduct.<sup>157</sup> Purely expressive associations should be exempt from the *Roberts* balancing test if they can show that the unwanted member significantly affects its ability to disseminate its message. Protection of the message itself should be judged by the same standards as protection of speech by an individual.<sup>158</sup> Under this standard, no state interest can be compelling enough, or narrowly tailored enough, if it prevents a purely expressive organization from selecting its membership for the purpose of defining its voice. In addition, only by providing this increased protection will groups formed for general purposes, such as the Boy Scouts, be safe from a judicially active court that seeks to impose its own agenda on the organization. Not only is this high level of protection logical considering that the organization is engaged predominantly in First Amendment activity, it is also in harmony with case law.<sup>159</sup>

Although this standard and the majority's standard in *Dale* do share some element of absolutism, they are nonetheless quite distinguishable in scope. As discussed above, the majority's opinion stated that courts must give deference to an organization as to its assertion of how its exclusionary policy is connected to its expressive purpose. In addition, courts must give deference with respect to the group's view on how the forced inclusion of the unwanted member would affect its message.<sup>160</sup> By giving this deference without qualification, and without any discussion of the state's compelling interest, the majority's standard implicitly grants organizations engaged predominantly in non-expressive activity the right to discriminate. By contrast, this proposed standard requires courts to qualify the group claiming the right to discriminate. If the court finds the group is a purely expressive association, courts would then be required to give

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156. See NOWAK & ROTUNDA, *supra* note 100, at 1065.

157. See *id.*

158. "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring); see also *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

159. Since *Roberts* was the only case squarely addressing the conflict between a private club and a state's antidiscrimination law prior to *Dale*, this proposed standard would still be in harmony with *Roberts*. See *supra* note 90.

160. See *supra* notes 96-100 and accompanying text.

deference to the organization's claims as to what will affect its ability to disseminate its message. In other words, rather than give complete deference to any organization engaged in *some* expressive activity, this proposed standard requires courts to determine the *quality* and *quantity* of expressive activity for which the organization is engaged. Only when this is determined will the court know whether the group is entitled to the highest form of First Amendment protection, or the right to select its membership as well as its message.

One example of a group meeting the above criteria is the Boy Scouts of America. Not only was it formed for the purpose of instilling values in young men, its predominant activity is teaching principles of morality, physical fitness, and outdoor survival. This teaching is carried out explicitly through verbal instruction, and is carried out implicitly through the scout leaders' examples. Although the Boy Scouts collect dues, sell uniforms and related scouting items, such commercial activity is to further the organization's expressive activities. And while the Boy Scouts do have a relatively non-selective membership policy with respect to youth members, its policy with respect to adult leaders is much more selective.<sup>161</sup> Thus, it is evident the Boy Scouts tailor its adult membership in order to define the voice that will communicate its message to instill values in youth. As such, the majority's conclusion that the Boy Scouts should not be subject to the *Roberts* balancing test was proper.<sup>162</sup>

### **Quasi-Expressive Associations Deserve Intermediate Constitutional Protection**

Courts should afford intermediate protection to groups formed for expressive purposes that are engaged in "quasi-expressive" association, or a mixture of commercial/expressive activity. Under the proposed standard, once the private group met this threshold criteria, the state would have the burden of showing it has a compelling interest and that its anti-discrimination law is the least restrictive means to achieving that interest. On the other side of the *Roberts* scale, the group must prove that the forced inclusion of the unwanted member would significantly impede its ability to express its message. The outcome would be determined by how narrowly the state's interest was defined, how clearly the private organization's expressive purpose was articulated, and how well the expressive purpose was connected to the exclusionary policy.

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161. See *supra* note 123.

162. Although the majority's implicit conclusion that the Boy Scouts was not subject to New Jersey's compelling interest was correct, this Note contends it erred by not qualifying which groups were so entitled. See *supra* notes 95-100 and accompanying text.

This standard is distinguishable from the standard applied to purely expressive associations in two distinct ways. First, this standard incorporates the *Roberts* balancing test, whereas the standard for purely expressive associations would not. Second, the quasi-expressive organization would not be entitled to judicial deference. Rather, the courts would conduct an independent investigation by looking into all the evidence from the individual claiming discrimination as well as the private group, and then use its own judgment as to whether the group's exclusionary policy is connected to its expressive purpose, as well as how the forced inclusion of the unwanted member would affect the organization's ability to disseminate its message. Thus, although an organization engaged in substantial commercial activity could overcome a state's interest in eradicating discrimination, such would be the exception rather than the general rule. As such, most private organizations would be subject to its state anti-discrimination laws that fit into this category.

One example of a group qualifying for this intermediate protection is the United States Jaycees. In *Roberts*, the Court agreed that the Jaycees was created for the purpose of pursuing educational and charitable purposes to foster the growth and development of young men's civic organizations in the United States. As discussed above,<sup>163</sup> however, much of its activity was commercial in nature. Although Minnesota had a compelling interest in eradicating discrimination against women, the Jaycees could not show how the integration of a woman as a full status member would significantly affect its ability to communicate its message. In that case, the Jaycees were not only subject to the balancing test, but the Court refused to give it deference with respect to how a woman with the status of a full member would significantly affect its message.

An even lesser form of protection should be afforded to quasi-expressive groups formed for commercial purposes, yet engaging in a mixture of non-expressive and expressive activities. This type of group would have the initial burden of showing that it is engaged in substantially expressive activities. The individual claiming discrimination would then have to prove that the state's interest in enacting the law was an important one, and that the law is narrowly tailored to serve that interest. As with the quasi-expressive association discussed immediately above, under this regime courts should not give deference to an organization as to its view of how the forced inclusion of the unwanted member would significantly affect its ability to disseminate its message. So long as the state's law against discrimination was narrowly tailored to serve its purpose, the private organization would not likely be entitled to discriminate in its membership policies, since

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163. See *supra* notes 12-31 and accompanying text.

most laws against discrimination serve important governmental interests.

### **Non-Expressive, Commercial Associations Deserve the Least Constitutional Protection**

Courts should afford the least degree of protection to an association formed for, and engaged predominately in, non-expressive commercial activity.<sup>164</sup> Under this scheme, the state must prove that its law is only rationally related to its purpose; if it was, the state could compel the group to integrate the unwanted member. Under this standard, then, commercial organizations would receive virtually no protection.<sup>165</sup>

## **V. CONCLUSION**

States are playing an active role in eliminating discrimination from both public as well as private organizations. Laws against discrimination are becoming increasingly broad, protecting an ever-expanding base of classes. As benevolent as a state's interest may be in eradicating discrimination, however, not all classes are entitled to the highest degree of First Amendment protection. In addition, certain types of discrimination are not only constitutionally permitted, but crucial in preserving our identity as Americans.

This Note proposes a logical compromise to two competing standards of expressive association: the *Roberts* ad hoc balancing test and the freedom of speech standard espoused by the majority in *Dale*. The proposed standard not only protects purely expressive organizations from judicial activism and overly broad state laws, it also provides states with maximum power in eradicating the harmful effects of unconstitutional discrimination. If the Supreme Court adopted this standard, the tension caused by the dichotomy between equality and freedom will be significantly reduced, and lower courts will be bound to follow a more objective, consistent standard.

Even if this Note's proposed standard is not implemented, *Dale* is still a victory. It is not only a victory for private organizations that seek unfettered expression, but also a victory for every minority group

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164. "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex." *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., dissenting).

165. Commercial associations may, of course, be entitled to freedom of speech rights if such can show it seeks to disseminate a certain message at certain time or place. See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990) (discussing how a corporation's political contributions are entitled to protection as speech, despite the commercial nature of the organization).

claiming oppression, including gays and lesbians. *Dale* protects every oppressed individual's right to form a group for the purposes of expressing ideas, no matter how general, without fear that a court will force it to include an individual that will potentially impede that group's ability to freely express ideas. Quoting the Supreme Court, one constitutional law professor insightfully stated, "We cannot limit the Boy Scouts' First Amendment rights without limiting everyone's First Amendment rights . . . [f]or minority groups that often face discrimination from the majority, this is a constitutional guarantee worth protecting."<sup>166</sup>

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166. Thomas E. Baker, *In Wake of Dale; Is Boy Scouts Ruling Major Setback or Victory for Gay Rights?*, FULTON COUNTY DAILY REP., July 13, 2000 (Thomas E. Baker is the James Madison Chair in Constitutional Law and director of the Constitutional Law Center at Drake University Law School).